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In the Supreme Court of the United States

October Term, 1949

No. 135

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners,

Petitioners,

vs.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual d oing business as CONCRETE CONSTRUCTION COMPANY,

Respondent,

A. J. GOERIG and CLYDE PHILP, individuals and co-partners,

Defendants,

CONTINENTAL CASUALTY COMPANY, a corporation,

Additional Petitioner.

Reply of Continental Casualty Company To Respondent's Brief Opposing Certiorari

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Miller Building
Yakima, Washington

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SUBJECT INDEX

	Page
No Sound Legal Basis for Liability of Continental	2
Action Is Barred by Subcontract Provision as to Delay	12
Failure to File Timely Assumed Trade Name	13
Conclusion	14

TABLE OF CASES

Brewster District Unit v. Monroe, 117 Wash. 21, 200 Pac. 841	8
Brown v. Brew, 99 Wash. 560, 169 Pac. 992	8
Freyman v. Day, 108 Wash. 71, 182 Pac. 940	13
Friestedt Co. v. U. S. Fireproofing Co., 125 F. 2d 1010	11
Laughlin v. March, 19 Wn. 2d 874, 145 P. 2d 549	13
Marston v. Rue, 92 Wash. 129, 159 Pac. 111	13
McEvoy v. U. S., 322 U. S. 102, 88 L. Ed. 1163	11
Miami Coca Cola Bottling Co. v. Orange Crush Co., 296 Fed. 693	8
Mowbray Pearson Co. v. Stanton, 109 Wash. 601, 187 Pac. 370, 190 Pac. 330	8
Norm Advertising v. Monroe, 25 Wn. 2d 391, 171 P. 2d 177	14
Plath v. Mullins, 84 Wash. 403, 151 Pac. 811	13
U. S. v. John A. Johnson & Sons, 65 Fed. Supp. 514, 526-532	11
U. S. v. Maryland Casualty Co., 147 F. 2d 423 affirming 54 Fed. Supp. 290	11
U. S. v. Seaboard Surety Co., 25 Fed. Supp. 681	11
U. S. v. Zara Contracting Co., 146 F. 2d 606	9
Willard Sutherland & Co. v. U. S., 262 U. S. 489, 67 L. Ed. 1086	8
Williams v. Great Northern Ry. Co., 108 Wash. 344, 184 Pac. 340	13
Woods v. Interstate Realty Co., U. S., 93 L. Ed. (Adv. Op.) 1245, 69 S. Ct. 1235	13
Rules of Civil Procedure, Rule 17 (b)	13

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This reply to respondent's brief is respectfully submitted by Continental Casualty Company, additional petitioner and statutory surety for the Macris, petitioners herein.

In Cause No. 791, preceding term, this Court last June denied Continental's petition for certiorari, but said cause is still pending undetermined on Continental's petition for rehearing. As pointed out therein, it would be grossly unjust and unthinkable for Macris' petition for certiorari to be granted or the judgment as to Macris reversed unless

similar relief is granted to Continental. Manifestly the liability of the principal may exceed the liability of the surety, but on the other hand the liability of the surety can never be greater than the liability of its principal. Consequently, if there is no liability on the part of Macris, there can be no liability on the part of Continental, which is merely the surety on Macris' statutory payment bond under the Miller Act.

Continental adopts and incorporates by reference all of the arguments and authorities cited in the opening brief and reply brief of petitioners, Macris, herein.

1. NO SOUND LEGAL BASIS FOR LIABILITY OF CONTINENTAL.

Moreover, we sincerely believe and respectfully submit that respondent's brief herein itself clearly establishes that under these facts there can be no liability of Continental herein.

Respondent's brief concedes, as it necessarily must: (1) That there was originally a written subcontract between Macri and Schaefer; (2) that Schaefer has heretofore been paid practically the full agreed contract price thereunder; (3) that Schaefer's claim arises from Macri's alleged breaches of said contract, thereby (a) increasing Schaefer's expense of performance of his subcontract, and (b) resulting in Schaefer performing part of the work to be done by Macri thereunder; (4) that Schaefer's case is based

primarily on alleged oral promises *of Sam Macri* to pay Schaefer his *additional costs* of performance; (5) that Continental had no knowledge of any of these matters and never consented thereto; (6) that Schaefer never agreed or obligated himself to perform any additional work whatever other than that covered by his original written subcontract—in other words, there was never any mutually binding contractual modification thereof nor any additional contract entered into; and (7) that Schaefer kept no record from which his *additional costs* of performance could be determined.

Yet notwithstanding these facts, all of which are conceded by respondent, he has erroneously recovered, and now seeks to sustain, a judgment against Continental for damages for Macri's breaches of the subcontract. He has erroneously recovered and seeks to sustain a judgment against Continental not only for his alleged *additional costs* of performance, but also his *entire* costs on the job, and added thereto 20% for overhead expense, plus 10% for profit.

But obviously Macri was not an agent of Continental. In the absence of a new mutually binding contract or mutually binding modification contract, clearly Continental did not assume any additional obligations merely by reason of gratuitous oral promises of Macri to pay additional casts to Schaefer, wholly unknown to Continental.

Likewise, a promissory estoppel, if any, on the part of Macri clearly would not create an estoppel as against Continental. Admittedly Continental had no knowledge of these alleged breaches of the subcontract by Macri nor or Macri's alleged oral promises. Continental never made nor authorized any subsequent promises or agreements. So long as the full original contract price was paid, Continental had no additional liability, assumed no additional obligation, and never became in any manner estopped to say so.

It is fundamental that where there is an express contract, the law will not imply a contract. Here there was an express written contract and no subsequent modification contract. There was never any new contract entered into. Schaefer flatly refused to assume any additional contractual obligations whatever. As stated by the district court, he continued to complain to Macri concerning the latter's performance throughout the job. (R. 2213-5). Consequently under these circumstances the law will not imply a contract, and Schaefer cannot recover on either an implied in fact or quasi contract. Certainly this is true as against Continental, which made no additional promises and which never estopped itself.

The entire basis of the decision of the court of appeals, namely, that there was a new agreement or contract between Macri and Schaefer, is completely contrary to the

evidence, contrary to the decision of the district court, who saw and heard the witnesses, and contrary to the statements in respondent's brief. The attempt of the court of appeals to distinguish this case from contrary decisions in other circuits is therefore wholly unsound.

Nor is there any merit to respondent's contention (p. 8) that he is not seeking recovery of damages for breach of contract. While it is true that he is seeking recovery in form under the legal theory of quantum meruit, nevertheless his whole case, if any, is founded upon recovery of additional compensation by reason of Macri's breach of contract. Regardless of form or technical legal theory, the substance of respondent's claim is therefore clearly recovery of damages based on Macri's breach of contract.

The district court denied recovery on respondent's first cause of action based on an alleged express contract and permitted recovery only on the second cause of action based on implied or quasi contract. However, it is obvious and has at all times been conceded by respondent that if Macri had properly performed his obligations under the subcontract, respondent would have no standing in court at all. Looking through form to substance, this case is nothing more than an ingenious attempt to recover damages or additional compensation for Macri's breach of

contract. It is well settled that this may not be done, especially as against the statutory surety.

At page 14 of his brief, after stating his principal contention, respondent admits:

> "*The basis of this contention is* that the District Court and the Court of Appeals found the following facts: (1) *Petitioners were guilty of willful and negligent material breaches of the subcontract* through the performance of the work by respondent, in the respects mentioned in the statement of the case." (All italics are ours).

Again at page 31 respondent states:

> "As previously pointed out, it is not entirely clear whether Mr. Macri promised Mr. Schaefer to pay all of respondent's costs, *or only his extra costs due to petitioners' breaches of the subcontract.*"

It is perfectly clear therefore that respondent's entire case is predicated upon recovering additional compensation due to Macri's breaches of the subcontract.

Respondent seeks to bolster his principal contention (p. 17-18) by resort to the substantial performance doctrine, namely, that where a *plaintiff* has substantially performed his contract, he can recover thereon, less deductions for defects to be corrected or omissions to be supplied, except where the plaintiff wilfully fails or refuses to perform his contract. But in this case whether or not Macri *wilfully* breached the contract is wholly immaterial. *Macri is not the plaintiff* and is not seeking to rely upon

the substantial performance doctrine. Schaefer is not relying thereon, as no one disputes that he performed his contract and is entitled to, and has in fact been paid, his original agreed contract price of $26.00 per cubic yard of concrete. Respondent's case is weak indeed when he relies upon any such far fetched and wholly inapplicable principle.

Respondent concedes (p. 25) that *"there can be no implied-in-fact contract contrary to an express contract."* Here there was an express contract that Schaefer would do this job for $26.00 per cubic yard of concrete installed, or the total agreed contract price of $35,271.12, all of which (with a slight exception) has been fully paid. The matter being covered by an express contract, upon fundamental principles the law will not imply a contract for the payment of a greater amount.

Respondent concedes (p. 25-27) that there was no mutually binding express bilateral contract entered into between these parties for the performance of additional work other than that covered by the original subcontract. The record is undisputed that there was none. It is therefore absurd for respondent to contend that there was a valid binding enforceable "unilateral" contract between these parties. It is well settled in Washington as elsewhere that mutuality and mutually binding obligations are essential for the existence of valid enforceable contract.

In *Brown v. Brew*, 99 Wash. 560, 169 Pac. 992, the court said:

> "A promise for a promise is a sufficient consideration for any contract, but *there is no dispute in the law that such promises, in order to be binding, must be mutual, concurrent and obligatory upon both parties to the contract; both parties must be bound at one and the same time, otherwise there is no contract.*"

In *Miami Coca Cola Bottling Co. v. Orange Crush Co.*, 296 Fed. 693, (CCA 5) the court said:

> "The appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable." (Citing numerous cases).

See also to the same effect:

Willard Sutherland & Co. v. U. S., 262 U. S. 489, 67 L. Ed. 1086; *Mowbray Pearson Co. v. Stanton*, 109 Wash. 601, 187 Pac. 370, 190 Pac. 330; *Brewster Dist. Unit v. Monroe*, 117 Wash. 21, 200 Pac. 841.

Respondent concedes (p. 27) that there was never any rescission of the original written subcontract. Consequently the same is binding upon him, and he cannot recover additional compensation over and above $26.00 per cubic yard in excess of the agreed contract price.

Schaefer's claim is for not only additional labor, such as excavation and fine grading, not called for by his subcontract, *but is also for damages for delay and additional*

costs of performance of the same identical work required of him by his subcontract, plus overhead and profit. This is repeatedly conceded at pages 7 and 32-35 of respondent's brief. In the absence of a rescission, and admittedly there was none, the contract remains in effect, and Schaefer cannot recover a dime more than the original agreed contract price from the petitioner, even though the job may have been somewhat delayed by Macri. Schaefer's claim is composed of these two separate claims — (1) additional work not called for by his subcontract, and (2) additional cost of performing his subcontract—and there is no evidence whatever which establishes the amount of recovery upon either of them separately. Clearly he is not entitled to recover upon either.

The case principally relied upon by respondent and the only case cited by him involving liability of a surety under the Miller Act, *U. S. v. Zara Contracting Co., 146 F.* 2d 606, is clearly distinguishable. There, except for one $100 item, the subcontract was for the entire job covered by the principal contract. Two months after commencement of the work the principal contractor wrongfully and unjustifiably prevented the subcontractor from completing the work, and the principal contractor finished performance thereof. There was undoubtedly a total rather than partial breach of contract. The subcontractor did not continue performance but ceased and was in fact prevented from

further performance. The court merely held that under such circumstances the subcontractor could recover on quantum meruit for such past performance. The amount of recovery, however, was substantially less than the total contract price. Everything that was done by the subcontractor was work required by both the subcontract and the principal contract, and consequently the surety was liable. There was no recovery of profit and the recovery was based on plaintiff's "*costs.*" The principal contention of the surety apparently was that it was not liable for rental of equipment. The court also there held at page 609 that the plaintiff's' claim for extra compensation in addition to the contract could not be maintained if he were relying upon the express contract. Also there the principal contractor had received additional compensation from the government for the same work performed by the subcontractor.

At page 611 the court said:

> "*It is therefore appropriate here . . . to make use of the contract as fixing the basic price.*" (Citing authorities).

For the foregoing numerous reasons that case is clearly distinguishable, and actually it supports our position rather than that of respondent, as all of the labor there performed was supplied under both the principal contract and the subcontract and was used in the prosecution of said work;

and therefore the amount sued for and recovered was *within the contract rather than outside of the contract.*

Here Schaefer is seeking to recover from the Miller Act surety amounts which are outside of the contract rather than within the contract. This cannot legally be done. *Schaefer's claim is directly predicated on Macri's alleged breach of contract, and not on respondent's furnishing of labor and material pursuant to contract.*

This increased cost of performance was outside of the scope of respondent's obligations under the subcontract and outside of the scope of Macri's obligations under the prime contract with the Government. What was done by Schaefer, not already paid for, was not required by any of the terms of the contract, but became necessary solely because of Macri's breach of the subcontract.

The authorities clearly establish that in such case there is no liability of the Miller Act surety.

Friestedt Co. v. U. S. Fireproofing Co., (CCA 10), 125 F. 2d 1010; *U. S. v. Maryland Casualty Co.,* (CCA 5), 147 F. 2d 423, affirming 54 Fed. Supp. 290; *U. S. v. John A. Johnson & Sons,* 65 Fed. Supp. 514, 526-532; *U. S. v. Seaboard Surety Co.,* 26 Fed. Supp. 681; *McEvoy v. U. S.,* 322 U. S. 102, 88 L. Ed. 1163.

There is therefore clearly no merit in any of respond-

ent's contentions as to liability of Continental or Macri upon any of the grounds urged in respondent's brief.

2. ACTION IS BARRED BY SUBCONTRACT PROVISION AS TO DELAY.

Contrary to respondent's contention (p. 44) paragraph 5 of the subcontract quoted in petitioner's brief (p. 35) shows that respondent's sole remedy for delay was to secure additional time for performance.

This provision 5 of the subcontract was quoted and this contention made at pages 7, 8 and elsewhere in Continental's opening brief in the court of appeals. That court erroneously denied this contention, although not discussing the same in the opinion.

As shown at pages 32 to 35 of respondent's brief, his claim is very largely an attempt indirectly to recover damages for delay by recovery of alleged increased costs of performance plus profit and overhead.

Continental has never waived this provision of the subcontract by agreeing to pay respondent's costs or otherwise. Continental has never had knowledge of nor consented to any abrogation of this or any other portion of the subcontract. The same clearly precludes recovery by respondent herein.

3. FAILURE TO FILE TIMELY ASSUMED TRADE NAME.

Contrary to respondent's contention (p. 46), the three recent decisions of this Court on June 20, 1949, and particularly *Woods v. Interstate Realty Co.*, U. S., 93 L. Ed. (Adv. Op.) 1245, 69 S. Ct. 1235, clearly establish that this judgment must be reversed because of respondent's failure to comply with the Washington statute requiring timely filing of the assumed name certificate prior to the trial.

Manifestly, Rule 17 (b) of the Rules of Civil Procedure relates to capacity to sue in the sense of age, mental capacity, etc. Certainly this Court in adopting that rule never intended to abrogate the statutory requirements of the state in which an action is brought.

It is useless for respondent to rely upon the law of Oregon because he failed to prove that he had filed any such certificate *in either Oregon or Washington* prior to the trial.

It is well settled in Washington and generally that in the absence of pleading and proof to the contrary, the law of another state is always presumed to be the same as the law of the State of Washington.

Plath v. Mullins, 87 Wash. 403, 151 Pac. 811; *Marston v Rue*, 92 Wash. 129, 159 Pac. 111; *Freyman v. Day*, 108 Wash. 71, 182 Pac. 940; *Williams v. Great Northern Ry. Co.*, 108 Wash. 344, 184 Pac. 340; *Laughlin v. March*, 19 Wn. 2d

874, 145 P. 2d 549; *Norm Advertising v. Monroe*, 25 Wn. 2d 391, 171 P. 2d 177.

Since this Court has now definitely determined that neither a resident nor a non-resident of a state may maintain an action in either the state or federal courts therein without complying with the state's statutory requirements of the forum where the action is brought, and Schaefer failed to do so, it necessarily follows that this judgment must be reversed and the action dismissed for failure to comply therewith.

Continental therefore respectfully submits that its petition for rehearing should be granted, that the petitions of both Continental and Macris for writs of certiorari should be granted, and this clearly erroneous judgment should be reviewed and reversed and the action dismissed.

Respectfully submitted,

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